Situation 1:

MANZIERE- SUPPORT FOR PARTNERSHIP AND FIDUCIARY DUTIES- OR DOES IT FALL FLAT?

Costanza is a retired marketing executive in Florida. The inventive and imaginative Kramer recently moved down to Florida to live and Costanza helps Kramer to find a place. Kramer, who has not yet had one of his inventions produce much of a profit for him, had little money to his name to use for purchasing the property. Costanza and Kramer came to an agreement and purchased the place together. Costanza paid the majority of the amount and Kramer would live there year-round and make payments, with interest, to Costanza until his part would be paid off. No defined terms were developed to define how much each payment would be or for when the total should be paid off.

While Kramer was living there he developed a prototype for the Manziere and introduced it to Costanza and had him try it out. Kramer discussed interest in Costanza's possible connections and asked, "what do you say- you, me, and the Manziere?" Excited for the possibility of profit for this product, Costanza decided to do what he could to ensure that he would be on the profit earning side of the venture. Kramer made some copies of the product and began marketing them to small independent boutiques and consignment shops around his location in Florida. Although Kramer had a few shops that agreed to sell the Manziere, business was slow.

A short time later, Costanza was having second thoughts about the success of the Manziere and shared some of his concerns with Kramer, saying "we might as well cut our losses and just throw in the towel." However, unbeknownst to Costanza, Kramer had been contacting a company, Victor's Whispers, wishing to sell off the rights to Kramer's product so that they might put it into mass production. A few days after Costanza had expressed his concerns, Victor's Whispers reached out to Kramer and offered him $2M for his rights to the Manziere. Kramer, thrilled over the break he received, agreed and Kramer and Victor's Whispers sign off on the deal that very day.

Costanza finds out about the deal and files suit alleging that Kramer has breached fiduciary relationship pursuant to his partnership with Costanza and that the duties were breached when Kramer conspired to sell the product to the Victor's Whispers, terminating Costanza's rights to 50% of the profits. Kramer argues that he never formed a partnership with Costanza and that Costanza's argument lacks support.

Was a partnership formed between Kramer and Costanza? Has Kramer breached a fiduciary duty to Costanza?

SITUATION 1: MANZIERE APPLICABLE STATUTES AND CASE LAW

Florida Statute: Chp 620. Partnership Laws- Revised Uniform Partnership Act

§620.8202 Formation of Partnership

(1) the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership

…

(3)…In determining whether a partnership is formed, the following rules apply:

(a) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not, by itself, establish a partnership, even if the coowners share profits made by the use of the property

…

(c) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

1. Of a debt by installments or otherwise;

…

3. Of rent;

…

5. Of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; …

§620.8401 Partners Rights and Duties

(1) Each partner is deemed to have an account which is:

- (a) Credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and
- (b) Charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

(2) Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.

§620.8404 General Standards of Partner's Conduct

(1) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care,

(2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(a) To account to the partnership and hold as trustee for the partnership any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(c) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

…

(5) A partner does not violate a duty or obligation under this act or under a partnership agreement merely because the partner's conduct furthers the partner's own interest.

§620.8405 Actions by Partnerships and Partners

(1) A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.

(2) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:

…

(b) Enforce such partner's rights under this act, including:

1. Such partner's rights under §620.8401, … or §620.8404

…

Situation 2:

PIZZA-R-US: FIGHTING FOR A SLICE OF THE PIZZA PIE- PIERCING THE CORP VEIL FOR A CLOSELY HELD CORPORATION

FORMATION

Kramer -- dumped by his cheating, no-good ex-wife-- decides to live his dream of owning and operating a traditional pizza shop in Miami.

Kramer has zero business sense, and not much more culinary skill, so he joins forces with his good friends, George, Jerry, and Elaine.

Kramer goes online and downloads LLC formation documents and an operating agreement from El Cheapo Legal Forms, Ltd. Elaine, Jerry, Kramer and Pizza Face, LLC (a new entity formed by George to own his interest) – all execute the Articles of Organization and Bylaw forms as managers, and file them online with the Secretary of State.

George inserts language into the Operating Agreement providing for indemnity of the Members in the event of a claim or lawsuit based on activities performed within the scope of employment by the LLC. All Members become employees of the new LLC. The Operating Agreement recites Florida law on automatic dissociation in the event of bankruptcy. Everybody signs the Operating Agreement.

Jerry talks No-Doc Loan Company, Inc. into loaning the LLC $150,000 to finance the initial start-up. No-Doc Loan Company, Inc. requires only Jerry to sign a personal guarantee.

Pizza-R-Us finds a cute, pricey, shop in Bal Harbour, and the shop has a well-received grand opening and things look promising. Jerry and George handle business aspects of the new pizza shop, Kramer is head chef, and Elaine becomes the hostess and waitress.

FATEFUL MEAL

One day Kramer's vacationing ex-wife walks into the shop with her wealthy new boyfriend. They order pizza and beer.

Kramer, blinded by jealously and vengeance, sprinkles the boyfriend's pizza with marijuana flakes instead of oregano. In his blind fury, he adulterates her pizza crust with borax.

The boyfriend becomes quite intoxicated between the beer and the pot – and proceeds to crash his brand new Lamborghini into a pier two miles from the restaurant. The ex-wife suffers a perforated esophagus from the borax burns, but survives.

SO MANY TO SUE, SO LITTLE TIME - DISCUSSION QUESTIONS

The lawsuits flew. Both patrons sued the Pizza-R-Us LLC for every tort known to Florida lawyers.

1) **<u>Can the boyfriend and ex-wife pierce the LLC to hold any of the manager/members personally liable?</u>**
    a. YES, who?
    b. NO, why

2) Meanwhile, Pizza Face, LLC (George's separate, sole ownership entity) declared bankruptcy due to overwhelming legal bills split among the members of Pizza-R-Us, LLC. George watched as his creditors (and there were many), imposed a charging lien on his interests.

Can his creditors get more than a charging lien against LLC Pizza Face…and/or can they reach George personally?

a. Yes
b. No

3) Needless to say, the pizza shop defaulted on its loan from No-Doc Loan Company, which in turn sued Jerry for indemnity and payment.
Does Jerry have recourse against his fellow manager/members?

a. Yes
b. No

SITUATION 2: PIZZA-R-US LEGAL AUTHORITY

STATUTORY LAW: (Chapter 605, rewritten and effective January 1, 2014)

605.0304. Liability of members and managers

(1) A debt, obligation, or other liability of a limited liability company is solely the debt, obligation, or other liability of the company. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the company solely by reason of being or acting as a member or manager. This subsection applies regardless of the dissolution of the company.

(2) The **failure of a limited liability company to observe formalities** relating to the exercise of its powers or management of its activities and affairs **is not a ground for imposing liability on a member or manager** of the company for a debt, obligation, or other liability of the company.

(3) The limitation of liability in this section is in addition to the limitations of liability provided for in §605.06093

(e.s.)

605.0403. Liability for contributions

(1) A promise by a person to contribute to the limited liability company is not enforceable unless it is set out in a writing signed by the person.

…….

4) The obligation of a person to make a contribution may be compromised only by consent of all members. If a creditor of a limited liability company extends credit or otherwise acts in reliance on an obligation described in subsection (1) without notice of a compromise under this subsection, the creditor may enforce the obligation.

605.04093. Limitation of liability of managers and members

(1) A manager in a manager-managed limited liability company or a member in a member-managed limited liability company is not personally liable for monetary damages to the limited liability company, its members, or any other person for any statement, vote, decision, or failure to act regarding management or policy decisions by a manager in a manager-managed limited liability company or a member in a member-managed limited liability company unless:

(a) The manager or member breached or failed to perform the duties as a manager in a manager-managed limited liability company or a member in a member-managed limited liability company; and

(b) The manager's or member's breach of, or failure to perform, those duties constitutes any of the following:

1. A violation of the criminal law unless the manager or member had a reasonable cause to believe his, her, or its conduct was lawful or had no reasonable cause to believe such conduct was unlawful. A judgment or other final adjudication against a manager or member in any criminal proceeding for a violation of the criminal law estops that manager or member from contesting the fact that such breach, or failure to perform, constitutes a violation of the criminal law, but does not estop the manager or member from establishing that he, she, or it had reasonable cause to believe that his, her, or its conduct was lawful or had no reasonable cause to believe that such conduct was unlawful.

……..

4. In a proceeding by or in the right of the limited liability company to procure a judgment in its favor or by or in the right of a member, conscious disregard of the best interest of the limited liability company, or willful misconduct.

5. In a proceeding by or in the right of someone other than the limited liability company or a member, recklessness or an act or omission that was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

605.0503. Charging order

(1) On application to a court of competent jurisdiction by a judgment creditor of a member or a transferee, the court may enter a charging order against the transferable interest of the member or transferee for payment of the unsatisfied amount of the judgment with interest. Except as provided in subsection (5), a charging order constitutes a lien upon a judgment debtor's transferable interest and requires the limited liability company to pay over to the judgment creditor a distribution that would otherwise be paid to the judgment debtor.

……

(3) Except as provided in subsections (4) and (5), a charging order is the sole and exclusive remedy by which a judgment creditor of a member or member's transferee may satisfy a judgment from the judgment debtor's interest in a limited liability company or rights to distributions from the limited liability company.

(4) In the case of a limited liability company that has only one member, if a judgment creditor of a member or member's transferee establishes to the satisfaction of a court of competent jurisdiction that distributions under a charging order will not satisfy the judgment within a reasonable time, a charging order is not the sole and exclusive remedy by which the judgment creditor may satisfy the judgment against a judgment debtor who is the sole member of a limited liability company or the transferee of the

sole member, and upon such showing, the court may order the sale of that interest in the limited liability company pursuant to a foreclosure sale. A judgment creditor may make a showing to the court that distributions under a charging order will not satisfy the judgment within a reasonable time at any time after the entry of the judgment and may do so at the same time that the judgment creditor applies for the entry of a charging order.

……..

(7) This section does not limit any of the following:

(a) The rights of a creditor who has been granted a consensual security interest in a limited liability company interest to pursue the remedies available to the secured creditor under other law applicable to secured creditors.

……..

(c) The availability of the equitable principles of alter ego, equitable lien, or constructive trust or other equitable principles not inconsistent with this section.

CASE LAW:

Fla. Specialty, Inc. v. H 2 Ology, Inc., 742 So. 2d 523 (Fla 1st DCA 1999) (holding officers of a corporation may be personally liable for their own torts even if their acts are performed as corporate officers); see also ***Estate of Canavan v. Nat'l Healthcare Corp.***, 889 So. 2d 825 (Fla. 2d DCA 2004) (holding that not only can an officer of a corporation be held liable for his or her own personal negligence while acting in that capacity, but a member of an LLC may also be personally liable for his or her own personal negligence or other tortious conduct while acting on behalf of the LLC)

Gasparini v. Pordomingo, 972 So. 2d 1053 (Fla. 3d DCA 2008) (holding mere ownership of a corporation by a few shareholders, or even one shareholder, is an insufficient reason to pierce the corporate veil; even if a corporation is merely an alter ego of its dominant shareholder or shareholders, the corporate veil cannot be pierced so long as the corporation's separate identity was lawfully maintained)

but see ***Eckhardt v. U.S.***, 463 Fed. Appx. 852 (11th Cir. 2012) (holding evidence that operator of automotive repair corporation was corporation's sole owner and president, was sufficient to establish that operator dominated and controlled corporation, as required to pierce corporate veil under Florida law, and further, evidence, including transfer of over $100,000 from account of automotive repair corporation to personal account of corporation's owner during time that corporation had unpaid employment tax liabilities, was sufficient to establish that corporation was used for improper purpose of evading employment tax liabilities, as required to pierce corporate veil under Florida law); see also ***Walton v. Tomax Corp.***, 632 So. 2d 178 (Fla. 5th DCA 1994) (holding corporate officer who controlled corporation and personally utilized its assets for payment of personal obligations generally treated corporation as a sham and was personally liable for corporation's debts, even though officer was not shareholder of corporation).

Houri v. Boaziz, 196 So. 3d 383 (Fla. 3d DCA 2016) (holding part owner of corporation that acted as sole managing member of LLC created to purchase, operate, manage, market, and resell apartment complex was not subject to personal liability for fraudulently inducing developer – a minority member of the LLC – to reduce what was to be his one-third interest in project by half, where developer and corporation executed operating agreements governing project and there was no showing that corporation was not lawfully formed or maintained).

Regions Bank v. Hyman, 2015 WL 1912251 (US Dist. M.D. 2015) The 2014 Legislative amendment to former Sec. 608.433, now Sec. 605.503, clarified the exclusive remedies available to a judgement creditor of an LLC is a charging order unless the LLC is single-member, and the judgement creditor shows that distributions under the charging order will not satisfy the judgment within a reasonable amount of time, then the court may order the foreclosure sale of the LLC interest.

Demir v. Schollmeier, 199 So.3d 442 (3rd DCA 2016), Members of LLC could not be held individually liable for capital contribution of other member, made explicitly to the LLC, in the absence of any provision or agreement in the formation documents or operating agreement indicating that any member of the LLC would be personally liable to any other member for the company's obligations. (decided under former version of 605.04093)

Situation 3:

TOP OF THE MUFFIN BAKERY:
DIRECT CORPORTATE LIABILITY vs. VICARIOUS CORPORATE LIABILITY
FOR PUNITIVE DAMAGE$

Mr. Lippman and Elaine opened a small bakery called Top of the Muffin, Incorporated. Mr. Lippman was its president and secretary. Elaine Benes was its vice-president, treasurer, and bookkeeper. The company's only employee was its baker, Mr. J. Peterman, who had just returned from Borneo and was looking for part-time work while he finished his memoirs. Muffin-top business was booming. Whatever happened to the muffin-stumps …nobody knew…for a while that is…

Peterman figured it was cheaper to dispose of the muffin stumps in bulk. Soon, the storage closet in the back of the bakery became filled to the brim with bags of stumps. One day, the bakery underwent a random health inspection and the muffin-stumps were discovered by Orlando's health inspector. It was clear the stumps had toxic black mold growing on them. The bakery's health citation stated that it "shall dispose of toxic muffin-stumps consistent with disposal of hazards to human health." The inspector told Elaine and Peterman, "*these things are really toxic and dangerous. If someone ate one, they could die*!" A toxic waste disposal company quoted Elaine $10,000 to remove the stumps! Elaine confided with Peterman she was worried the bakery would go under spending that much. Elaine sighed and said to Peterman as she left on a Friday, "*well…you heard the man, find the best way to get rid of these stumps, Peterman*!"

Peterman decided to dispose of the stumps in the bakery's back alley dumpster. As he did, he noticed the dumpster's "**no toxic waste**" placard. He then remembered how he and Elaine saw homeless people sometimes getting into the dumpster looking for day-old babka. The next day, Saturday, Elaine came back. She noticed the muffin-stump closet had been emptied. On her way out, she noticed the dumpster's lid lifted slightly with a black plastic trash bag sticking out. Later, on deposition, Elaine responded:

A: I never saw our dumpster that full before that day. I thought it was weird, and thought to myself, "*Peterman couldn't have been THAT dumb to throw out the muffin stumps, could he?"* But, I was running late to Zumba, I got in my car, and drove off.

On Sunday night, a homeless man named Costanza ate a muffin stump with toxic black mold and died because of it. **The homeless man's estate has sued the bakery for wrongful death. The estate now seeks leave of court to amend Plaintiff's complaint to add 2 counts of punitive damages against Elaine, individually (direct corporate liability), and against Top of the Muffin, Inc. for Peterman's gross negligence as an employee (vicarious corporate liability). The honorable Judge Brasington has set Plaintiff's motion to amend for hearing on April 20th, 2017 with 5 minutes of argument per side.**

SITUATION 3: TOP OF THE MUFFIN BAKERY

FLORIDA LAW FOR PLAINTIFF AND DEFENSE TO CONSIDER FOR ARGUMENT

Fla. Stat. § 768.72 - Pleading in civil actions; claim for punitive damages.

(1) In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages."

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

   a. "**Intentional misconduct**" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

   b. "**Gross negligence**" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

   a. The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;

   b. The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or

   c. The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

In making a determination to allow a Plaintiff leave to amend a complaint to add punitive damages claims, the Court must determine that the proffer of evidence provides a reasonable basis for the recovery of punitive damages pursuant to Fla. Stat. §768.72(1). In making this determination, the evidence must be viewed in the light most favorable to the moving party. See ***Estate of Williams ex rel. Williams v. Tandem Health Care of Florida***, 899 So.2d 369, 376 (Fla. 1st DCA 2005).

Florida courts have held that both corporate and individual employers may be held liable for punitive damages based on two different legal theories, either direct or vicarious liability. See ***Schropp v. Crown Eurocars, Inc.***, 654 So. 2d 1158 (Fla. 1995). More specifically, a corporation could be held liable for punitive damages either by vicarious liability based on the willful and malicious actions of an employee with a finding of independent negligent conduct by the corporation or by direct liability based on the willful and malicious actions of managing agents of the corporation. See Schropp, 654 So.2d at 1159.

DIRECT CORPORATE LIABILITY

In order to establish direct liability on behalf of a corporation, Florida courts have held that there must be a showing of willful and malicious action on the part of a managing agent of the corporation. See Schropp, 654 So. 2d 1158.

Estate of Williams, 899 So. 2d 369 (In suit brought against nursing facility after resident died from injuries resulting from a fall, nursing facility's behavior did not rise to the level of egregious conduct to award punitive damages where behavior included awareness that resident was at risk for falls, insufficient staffing, no steps taken to protect residents from falls, and resident was not placed in at risk program following her initial fall.)

White Constr. Co., Inc. v. Dupont, 455 So. 2d 1026 (Fla. 1984) (Evidence was sufficient to show that petitioners were negligent when they were aware that the loader's brakes had not been working for some time and the loader collided into a tractor- trailer injuring the driver, but was insufficient to submit the issue of punitive damages to the jury.)

VICARIOUS CORPORATE LIABILITY

After the enactment of Fla. Stat. § 768.72(3), corporations can only be found liable for punitive damages based on vicarious liability if the employee is guilty of intentional misconduct or gross negligence and if the corporation engaged in the type of conduct specified in **Fla. Stat. § 768.72(3)(a) to (c).**

"The courts held that in order to establish vicarious liability on the part of an employer or other principal for punitive damages, the plaintiff must plead and proved the following elements:

1) an employment or agency relationship;
2) willful and wanton acts on the part of the employee or agent which caused injury to the plaintiff;
3) those acts were committed within the scope of employment; and
4) some fault on the part of the employer or principal which is independent of the employee's conduct and foreseeably contributes to the injury."

6 Fla. Prac., Personal Injury & Wrongful Death Actions§ 15:15 (2008-2009 ed.). There is no requirement that the independent negligent conduct by the corporation be performed by a managing agent. See ***Partington v. Metallic Eng'g Co., Inc.***, 792 So.2d 498 (Fla. 4th DCA 2001).

Wayne Frier Home Center of Pensacola, Inc. v. Cadlerock Joint Venture, L.P., 16 So. 3d 1006 (Fla. 1st DCA 2009) (in a breach of contract and fraud case, evidence supported a finding that corporation's management participated in substitution of a mobile home without the buyer's consent or condoned or consented to such practice as the manager
testified that such was a matter of company practice.)